(12)

No. 92-357

In the
Supreme Court of the United States
October Term, 1992

Ruth O. Shaw, *et al.*,
Appellants,

v.

William Barr, *et al.*,
Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina Raleigh Division

STATE APPELLEES' BRIEF

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QUESTION PRESENTED

Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

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PARTIES

Plaintiffs/appellants are Ruth O. Shaw, Melvin G. Shimm, Robinson O. Everett, James M. Everett and Dorothy G. Bullock.

Defendants/appellees are Stuart M. Gerson*, Acting Attorney General; John Dunne, Assistant Attorney General of the United States, in charge of the Civil Rights Division; James B. Hunt, Jr.*, Governor of the State of North Carolina; Dennis A. Wicker*, Lieutenant Governor of the State of North Carolina; Daniel T. Blue, Jr., Speaker of the North Carolina House of Representatives; Rufus L. Edmisten, Secretary of State of the State of North Carolina; The North Carolina State Board of Elections; William Marsh, Jr.*, Chairman of the North Carolina State Board of Elections; M.H. Hood Ellis, Gregg O. Allen, Ruth Turner O'Bryan, and June K. Youngblood, in their official capacities as members of the North Carolina Board of Elections.

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* By operation of law these officials have been automatically substituted as parties upon assuming office.

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STATE APPELLEES' BRIEF

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following constitutional provisions, statutes and regulations:

Sections 1 and 5 of the Fourteenth Amendment to the Constitution of the United States. *See* Appendix at 1a.

Sections 1 and 2 of the Fifteenth Amendment to the Constitution of the United States. *See* Appendix at 1a.

Title 42, Section 1973 of the United States Code. *See* Appendix at 3a.

Title 42, Section 1973c of the United States Code. *See* Appendix at 5a.

Title 28, Part 51 of the Code of Federal Regulations (pertinent sections). *See* Appendix at 7a-8a.

STATEMENT OF THE CASE

This case presents a constitutional challenge to the congressional redistricting plan ("the Plan") enacted by the North Carolina General Assembly for elections beginning in 1992. As a result of population changes reflected in the 1990 census, the General Assembly faced the task of drawing a new plan with an additional, twelfth congressional seat. Two legal imperatives guided the legislature in performing this task: (1) compliance with the mathematically precise one-person, one-vote principles established by the court in *Reynolds v. Sims*, 377 U.S. 533 (1964), and (2) compliance with §§ 2 and 5 of the Voting Rights Act. 42 U.S.C. § 1973 *et seq.* Also to be accounted for were communities of interest created by the sometimes unique effects of North Carolina's geography,[1] economy,[2] and demography.[3]

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[1] Geographically, "North Carolina is divided into 3 rather clearly defined geographic areas: the Coastal Plain, the Piedmont Plateau and the Mountains." H. Lefler & A. Newsom, *North Carolina: The History of a Southern State* 18 (3rd ed. 1973). Each of these areas "has a distinct history and only in recent years have social and economic factors created a unifying force sufficient to overcome the differences and divisions long attributed to geographic influences." W. Powell, *North Carolina Through Four Centuries* 1 (1989).

[2] The economy of the Coastal Plain is predominantly based on agriculture while the economy of the Piedmont is predominantly based on manufacturing. O. Gade & H. Stillwell, *North Carolina: People and Environment* at 244, 250 (1986).

[3] Forty-eight percent of North Carolina's population lives in urban areas and fifty-two percent in rural areas. Of the State's urban residents only 14.5 percent live in cities with populations of more than 100,000. A larger percentage, 18.5 (continued...)

According to the 1990 census data, 21.97 percent of North Carolina's citizens are African-American, and 75.56 percent are white. The largest concentrations of African-American citizens live in the Coastal Plain, especially the northern part, and in the Piedmont. Within the Piedmont, the largest concentration of African-American citizens lives in the historically recognized Piedmont Crescent. O. Gade & H. Stillwell, *North Carolina: People and Environments* 65-66 (1986). "This almost continuous strip of industrial activity" is an arc encompassing North Carolina's largest cities, extending from Raleigh in the east through Durham, Greensboro, High Point and Winston-Salem to Charlotte in the west. W. Powell, *North Carolina Through Four Centuries* 5 (1989). For much of its length, the Piedmont Crescent is traversed by Interstate 85.

On July 9, 1991, the North Carolina General Assembly ratified a congressional redistricting plan which complied with one-person, one-vote requirements and included a district in the Coastal Plain with an African-American majority. Complaint (hereafter "Comp."), ¶¶ 13, 16, Jurisdictional Statement Appendix (hereafter "J.S. App.") at 78a, 79a. Because forty of North Carolina's one hundred counties are subject to the preclearance requirements of the Voting Rights Act, *see* 28 C.F.R. Part 51 Appendix, the Plan was submitted to the Attorney General of the United States (hereafter the "Attorney General") for preclearance. Comp. ¶¶ 14-15, J.S. App. at 78a-79a.

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[3] (...continued)
percent, live in small towns with populations between 2,500 and 25,000. Some observers have stated that it is "extraordinary that the nation's tenth most populous state is still more rural than urban, particularly when the country as a whole is about 70 percent urban." O. Gade & H. Stillwell, *North Carolina* at 54.

By letter dated December 18, 1991, the Attorney General objected to the Plan. Comp. ¶ 16, J.S. App. at 79a.[4] The basis of the objection was the Attorney General's conclusion that the State had not carried its burden of showing a lack of discriminatory intent. This conclusion was based in part on the Attorney General's view that there was significant interest among minority citizens in having a second majority-minority district and that alternative plans with two majority-minority districts, "including at least one alternative presented to the legislature," did exist, but that these alternatives were "dismissed [by the North Carolina General Assembly] for what appears to be pretextual reasons." J.S. App. at 4a.[5]

The "alternative presented to the legislature" with two majority-minority districts contained one such district in eastern and northeastern North Carolina and another majority-minority district in what the Attorney General described as the "south-central to southeast area." The district in the "south-central to southeast area" stretched from the most urban area of North Carolina, the city of Charlotte in Mecklenburg County in the far western portion of the Piedmont, through extremely rural areas, to the coastal town of Wilmington in New Hanover County. What the Attorney General described as "pretextual reasons" included

[4] The letter was not attached to Appellants' (hereafter "Plaintiffs") complaint or otherwise part of the record of the case, but it was quoted extensively by the District Court. *See* J.S. App. at 3a-4a, 43a, 48a. Copies can be found in the Appendix to this Brief at pages 11a-18a (hereafter "App. pp. ___") and in the Jurisdictional Statement to *Pope v. Blue*, No. 91-2038, which was filed with the Court by Plaintiffs.

[5] Another alternative plan before the Attorney General included one majority-minority district in the Coastal Plain and another generally following Interstate 85 through the industrialized Piedmont Crescent. This district closely resembles the Twelfth District ultimately created by the General Assembly and approved by the Attorney General.

the State's objection to the fact that the district was described as 191 miles long, mixed urban with rural areas, combined portions of the Piedmont with coastal areas, and combined African-American with Native American populations to achieve a majority-minority district even though there was substantial evidence that African-American and Native American voters did not vote cohesively.

On January 24, 1992, the General Assembly adopted the Plan challenged by Plaintiffs. The Plan satisfies one-person, one-vote requirements by dividing North Carolina's population as evenly as mathematically possible. *See Pope v. Blue*, No. 3:92CV71-P (W.D.N.C. April 16, 1992), *aff'd mem.*, 113 S. Ct. 30 (1992). It contains two majority-minority districts, both with African-American voting majorities.[6] In the First District, located entirely in the Coastal Plain, more than 80 percent of the residents live in rural areas or towns of less than 20,000 people. In the Twelfth District, drawn along Interstate 85 and the Piedmont Crescent, 80 percent of the residents live in cities with populations of more than 20,000.[7]

[6] The First District is 52.41% African-American in registered voters and 53.40% African-American in voting age population. The Twelfth District is 54.71% African-American in registered voters and 53.34% African-American in voting age population. See the analysis of each district set forth at App. pp. 19a-24a. This analysis reflects data contained in the 1990 Census of Population and Housing, P.L. 94-171, and was submitted to the Attorney General as a part of the request to preclear the Plan. The African-American percentages in the First and Twelfth Districts were achieved by drawing the two districts so they included parts of seventeen of the nineteen North Carolina counties with 20,000 or more African-American residents.

[7] Most of the counties included in whole or in part in the First District are subject to the preclearance requirements of § 5 of the Voting Rights Act. Additionally, eleven counties that are included in whole or in part in the First District were involved in two of the state legislative districts held in *Thornburg*

(continued...)

After the Plan was submitted to the Attorney General and precleared, Comp. ¶ 18, J.S. App. at 81a, Plaintiffs filed this action claiming that the Plan was a racial gerrymander in violation of Article One §§ 2 and 4 and of the Fourteenth and Fifteenth Amendments to the Constitution. The Plaintiffs, who are five white residents of the new Second and Twelfth congressional districts, sued the United States Attorney General and the Assistant Attorney General in charge of the Civil Rights Division in their official capacities. Comp. ¶ 6, J.S. App. at 73a-74a. They also sued the North Carolina State Board of Elections and a number of state officials in their official capacities. The complaint alleged that the federal Defendants "coerced" the state Defendants "into creating two amorphous" majority-minority districts and abridged the rights of all citizens and voters of North Carolina by their "enforcement of an erroneous interpretation of the Voting Rights Act. . . ." Comp. ¶¶ 28, 29, J.S. App. at 88a-90a. Although Plaintiffs amended their complaint to allege specifically that the state Defendants had an "unconstitutional and racially discriminatory intent and purpose" in drawing the districts, they did so by attributing an unconstitutional intent and purpose to the state Defendants in "conform[ing] to the requirements prescribed by" the federal Defendants. Amendment to Comp. ¶ 36(A), J.S. App. at 101a-04a (hereafter "Comp. ¶ 36(A).").

The three-judge District Court dismissed the claims against the state Defendants for failure to state a claim for relief pursuant

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[7](...continued)
v. Gingles, 478 U.S. 30 (1986), to violate § 2 of the Act. The Twelfth District includes portions of two counties subject to the preclearance requirements of § 5 of the Voting Rights Act -- specifically, Gaston and Guilford Counties -- and portions of Mecklenburg and Forsyth Counties, in which violations of § 2 of the Voting Rights Act were found with respect to legislative districts in *Gingles*. In addition, the Twelfth District includes part of Durham County, in which significant racially polarized voting was found in *Gingles*.

to Fed. R. Civ. P. 12(b)(6). It concluded that Plaintiffs' "broad claim of *per se* unconstitutionality because of the form of race-consciousness in redistricting at issue here is flatly foreclosed by . . . *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977). . . ." J.S. App. at 18a-19a. The majority also concluded that Plaintiffs had not alleged the necessary invidious discriminatory intent nor discriminatory impact on the part of the state Defendants in drawing the plan. J.S. App. at 21a-24a. Judge Voorhees dissented from this part of the opinion below. J.S. App. at 27a, 60a, 29a-60a *generally*.[8]

SUMMARY OF ARGUMENT

The Plaintiffs assert that the North Carolina General Assembly created two majority-minority congressional districts in order to comply with the requirements of the Voting Rights Act (as interpreted by the United States Attorney General) and that this purpose was constitutionally invidious. This argument is squarely contrary to this Court's equal protection decisions, including the cases addressing race-based claims of vote dilution and gerrymandering. *See, e.g., Rogers v. Lodge*, 458 U.S. 613 (1982). Those decisions hold that a legislature's intent is invidious only when its decision was motivated in part "because of, not merely in spite of, [the decision's] adverse effects" on the allegedly injured group. *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987). In the present case, the Plaintiffs have not alleged, and the District Court correctly held that they could not plausibly allege, that the

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[8] The majority also dismissed the claims against the federal Defendants for lack of jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. Rule 12(b)(1) and (6). J.S. App. at 7a-12a. Judge Voorhees joined the part of the opinion dismissing the claim against the federal defendants for lack of jurisdiction, but dissented from the Rule 12(b)(6) ruling regarding the federal defendants on the grounds that the court should not have considered the question. J.S. App. at 27a-29a, 60a.

legislature's decision embodied an intent to impose an adverse effect upon any racial group. The Plaintiffs, instead, ask the Court to abandon its traditional understanding of invidious intent for a revisionist interpretation that is not supported by the original meaning or the purpose of the Fourteenth or Fifteenth Amendments and that would require the Court to repudiate settled case law.

The decisions adjudicating race-based claims of unconstitutional vote dilution also require that plaintiffs allege a discriminatory effect amounting to exclusion from the political process. *See, e.g., White v. Regester*, 412 U.S. 755 (1973). The Plaintiffs make no allegation of such a discriminatory effect, and the District Court correctly held that they could not plausibly do so. The complaint, therefore, fails to state a cause of action both because it does not allege invidious intent and because it does not allege discriminatory effect.

In the alternative, the Plaintiffs argue that the State's Plan should be evaluated under the strict scrutiny inquiry applied to remedial racial preferences in public education, employment and contracting. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). There is, however, no reason for the Court to abandon its well-established case law governing claims about districting, *e.g., Rogers v. Lodge, supra*. The Plan does not afford or deny the relevant public good (the right to vote and to participate in the political process) on the basis of race, which is the situation the *Croson* test is designed to address. If *Croson* did apply, furthermore, it is evident from the Plaintiffs' own allegations that the Plan is a narrowly tailored means of pursuing the State's compelling interest in complying with the Voting Rights Act and addressing the present effects of public and private racial discrimination.

ARGUMENT

INTRODUCTION

The Court has directed the parties to brief the following question:

> Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

In the context of this case, the answer to the Court's question is, "Yes." Assuming *arguendo* that "the legislature did not accede to the plan suggested by the Attorney General," nevertheless, the Plaintiffs' allegations, and the premises on which their case is founded, do indeed preclude any "finding" that the legislature's congressional redistricting Plan was adopted with invidious discriminatory intent.[9]

Plaintiffs have alleged that the state Defendants drew their plan to comply with the Voting Rights Act, or at least to conform to the Attorney General's requirements for preclearance under § 5

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[9] The Attorney General has no statutory authority to suggest a redistricting plan, and the state Defendants do not understand the Attorney General's objection letter to have taken the unprecedented step of proposing a plan. To the extent that the letter implicitly suggested the means by which the State might satisfy the Attorney General's concerns, the suggestion was that the legislature create a second majority-minority district. The State's Plan, of course, did so. To the extent that the letter implicitly suggested where the districts should be located, alternative suggestions were made. One of those alternatives was in fact incorporated in the State's Plan.

of the Voting Rights Act. Plaintiffs have not alleged that the state Defendants used the preclearance process as a pretext for achieving some other racially-based motive in addition to the conscious drawing of majority-minority districts. That being so, Plaintiffs' complaint is grounded on a foundation which turns not upon whether the state Defendants acceded to any specific "plan suggested by the Attorney General," but on the assumption that the state Defendants' purpose was to satisfy the Attorney General's objection, regardless of where or how the districts were drawn. Plaintiffs' complaint is that the drawing of race-conscious districts is inherently unconstitutional or that, at least, the drawing of two majority-minority districts in North Carolina is necessarily unconstitutional when the districts are allegedly designed to guarantee the election of two minority members of Congress. As Plaintiffs candidly concede in their brief, it makes no difference to their case "whether or not the State Appellees accepted fully a redistricting plan suggested by the Attorney General." Appellants' Brief on the Merits, pp. 78-79 (hereafter "Pl.Br.").

As the District Court noted, Plaintiffs are white residents in a majority-white state with a majority-white legislature.[10] They do not allege, and cannot plausibly allege, that the state Defendants discriminated against them as white voters with the invidious intent essential to a successful racial gerrymandering claim.[11] Plaintiffs' status as white voters in North Carolina,

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[10] *See* J.S. App. at 18a, 23a. Of the 120 state House seats, fourteen were held by African-Americans and one by a Native American at the time the Plan was adopted. Five of the fifty state Senators were African-American.

[11] In its opinion, the District Court noted that the complaint does not actually state Plaintiffs' race and alleges injury not to the Plaintiffs as members of a particular race, but to all North Carolinians of all races. J.S. App. at 17a. Because taking this reticence literally would make the complaint "self-defeating" on its face, the District Court took judicial notice of the fact that the Plaintiffs are

(continued...)

given the racial composition of the State and of the legislature and the fact that ten of the State's twelve congressional districts are majority-white, forecloses any contention that the state Defendants acted with an intent to harm them because they are white. The complaint, accordingly, makes no such allegation. Thus, in this case, based on the complaint and theories propounded by the Plaintiffs, it makes no difference whether the legislature did or did not accede to any "plan suggested by the Attorney General" because Plaintiffs do not and cannot allege an intent to harm them specifically as white voters.

This case does not present the Court with any other challenges to the validity of the State's Plan. The State's congressional districts conform to the one-person, one-vote requirement as closely as is mathematically possible. The Plaintiffs have expressly disavowed any claim of political gerrymandering, Pl.Br. at 12, and do not ask this Court to craft federal constitutional standards governing the shape or compactness of congressional districts.[12]

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[11](...continued)
white and construed the complaint to allege injury based on that racial identity. *Id.* at 17a-18a. Before this Court, the Plaintiffs suggest at one point that two of their number have been injured by the Plan as "registered white voters" in one of the majority-minority districts, Pl.Br. at 44, but their fundamental claim remains one of injury to "North Carolina voters -- white and black." *Id.* at 45. *See also id.* at 67, 69 (describing the injury as one to "registered voters"). At least as a technical matter, therefore, Plaintiffs appear to lack standing. *See Schlesinger v. Reservists Committee*, 418 U.S. 208, 227-28 (1974) (injury to the "generalized interest" of all citizens in constitutional governance is too abstract to support standing).

[12] The Plaintiffs' allegation about the shape of the State's congressional districts is a statement of the injury they assert they have suffered rather than a free-standing constitutional claim. *See* Comp. ¶ 26, J.S. App. at 86a-87a. This Court's decision in *Pope v. Blue* already has rejected claims that the Plan violates constitutional standards of contiguity and compactness or is irrational. *See* Jurisdictional Statement of Appellants, *Pope v. Blue* at i (questions presented).

(continued...)

The Plaintiffs' claim under the Voting Rights Act rests entirely on their race-based constitutional argument. *See* Amendment to Comp. ¶ 2(A), J.S. App. at 104a-05a.[13]

In the remainder of this Brief, the state Defendants will analyze Plaintiffs' theories and the relevant case law to demonstrate why Plaintiffs' complaint was properly dismissed and why they cannot succeed on their complaint, an analysis which demonstrates why, at least in the context of this case, the allegation that the State acted with the intent to comply with the Voting Rights Act precludes a finding of invidious discriminatory intent even if the legislature did not accede to a "plan suggested by the Attorney General."

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[12](...continued)
In light of that fact, and of the Plaintiffs' statement that they "in no way adopt or incorporate the contentions" of the *Pope* plaintiffs, Comp. ¶ 19, J.S. App. at 82a, the suggestion in the brief amicus curiae of the Republican National Committee that this appeal presents such questions is insupportable.

[13] The Plaintiffs' statutory argument assumes that their constitutional claim is well-founded and asserts that this Court therefore must construe the Act to forbid the actions of the federal and state Defendants or declare the Act unconstitutional *pro tanto*.

I. THE NORTH CAROLINA LEGISLATURE'S INTENT TO COMPLY WITH THE VOTING RIGHTS ACT AND THE ATTORNEY GENERAL'S INTERPRETATION THEREOF PRECLUDES A FINDING THAT THE LEGISLATURE'S CONGRESSIONAL REDISTRICTING PLAN WAS ADOPTED WITH INVIDIOUS DISCRIMINATORY INTENT.

A. Plaintiffs Make No Allegation that the Legislature Acted with Invidious Intent as This Court Employs That Term.

The Plaintiffs' claim of racial discrimination is simple and straightforward: the General Assembly's purposeful use of race in redistricting, motivated by its desire to comply with the Voting Rights Act as interpreted and administered by the Attorney General, in and of itself constitutes the invidious discriminatory intent necessary to state an equal protection claim.[14] *See* Comp. ¶ 36(A).[15] This claim is flatly contrary to settled law. In the

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[14] The Plaintiffs allege violations of the Fifteenth Amendment, and of the Fifth Amendment by the federal Defendants, as well as of the Equal Protection Clause. For the purposes of this appeal, however, these provisions need not be treated separately: plaintiffs alleging racial discrimination in violation of each must be able to allege the presence of invidious intent in the challenged governmental action. *See Washington v. Davis*, 426 U.S. 229, 240 (1976) (Equal Protection Clause); *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion) (Fifteenth Amendment); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (Court's "approach to Fifth Amendment equal protection claims" is "precisely the same as to equal protection claims under the Fourteenth Amendment"). For the sake of brevity, this Brief will discuss the Plaintiffs' claims in terms of "equal protection."

[15] Plaintiffs correctly note that the state Defendants acknowledge that the legislature acted in a race-conscious manner, Pl.Br. at 21, but their conclusion that all "material facts are undisputed," *id.* at 81, is premature. Because the Defendants prevailed on a Rule 12(b)(6) motion to dismiss, they have not as yet
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absence of any claim about pretext, the Plaintiffs' affirmative statement that the purpose of the legislature's action was compliance with the Act precludes the possibility that the legislature's intent was invidious in the constitutional sense.[16]

This Court often has observed that it is a "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976). The Court has emphatically reaffirmed this principle in the area of voting rights: "[A] showing of discriminatory intent has long been required in *all* types of equal protection cases charging racial discrimination," *Rogers v. Lodge*, 458 U.S. 613, 617 (1982), including cases such as the present that allege an unconstitutional dilution of a racial group's voting strength. *Id.*[17]

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[15](...continued)
answered the complaint. For the purposes of the present appeal, of course, all factual allegations in the complaint must be taken as true.

[16] This action therefore is fundamentally unlike cases such as *Quilter v. Voinovich*, 794 F. Supp. 695 (N.D. Ohio 1992), *prob. jur. noted*, 112 S. Ct. 2299 (1992), which involve allegations of pretext. In *Quilter*, the plaintiffs alleged that the state legislature's professed intent to comply with the Voting Rights Act was in fact a pretext and that the actual purpose and effect of the legislature's legislative redistricting was to harm racial minority voters "under the guise of protecting minority rights." 794 F. Supp. at 698. The district court's holding in *Quilter* that the state legislature had an inadequate legitimate basis for its "wholesale" creation of majority-minority districts rested directly on its perception of "the pitfalls which arise from a *per se* application of majority-minority districting, *i.e.*, minority vote dilution [in violation of § 2 of the Voting Rights Act] can result from the concentration of minorities in districts." *Id.* at 702 n.2. In the present case, in contrast, the Plaintiffs have made no assertion that the State's purpose was anything other than what it purported to be, and they make no claim that the State's Plan violates § 2 of the Act.

[17] The Court recently reiterated the applicability of the invidious intent requirement to vote dilution claims in *Davis v. Bandemer*, 478 U.S. 109, 129 & n.11 (1986) (plurality opinion). *See also id.* at 171 n.10 (Powell, J., dissenting) (continued...)

The Plaintiffs therefore must allege that the Plan was enacted with a racially invidious intent in order to state a claim. The District Court correctly dismissed the action because the Plaintiffs have not alleged invidious intent in the sense in which this Court's precedents use that term.

According to the Plaintiffs, all that need be alleged to state an equal protection claim, at least with respect to intent, is that the state legislature knowingly drew up a reapportionment plan that contains two districts in which black voters are in a majority. It is that purposeful action, Plaintiffs assert, that embodied "a racially discriminatory intent and purpose, regardless of [the legislature's] motives." Comp. ¶ 36(A). As the District Court below correctly concluded, "this of course is not . . . the meaning of 'invidious' discrimination in equal protection jurisprudence." J.S. App. at 23a. "Simply put . . . the plaintiffs here have not alleged -- nor could they prove under the circumstances properly before us on this record -- an essential element of their equal protection (and parallel Fifteenth Amendment) claim: that the redistricting plan was adopted with the purpose and effect of discriminating against white voters such as plaintiffs on account of their race." *Id.* at 22a-23a.

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[17](...continued)
(voting rights cases "have construed the Equal Protection Clause to require proof of intentional discrimination . . . In none of those cases was the Court willing to assume discriminatory intent"). Racial vote dilution cases thus differ from cases in which government makes formal use of race or some other suspect classification as the express basis on which to differentiate between individuals. In vote dilution cases such as the present action, no one is being denied the relevant public good (the right to vote), and the formal classification the legislature is employing to organize the exercise of the franchise is geographic rather than racial.

The word "invidious" itself suggests the flaw in the Plaintiffs' argument: it is not every race-related decision that the Equal Protection Clause bans, but only those that flow from "prejudice and antipathy -- a view that those in the burdened class are not as worthy or deserving as others." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). It is clearly settled law that governmental awareness that a decision will have a specific impact on a protected class or activity does not by itself constitute the invidious intent necessary to make out an equal protection claim. In the leading case, *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), the Court rejected the argument that a state program giving an absolute preference in civil service employment to veterans was an unconstitutional discrimination on the basis of sex because the state legislature knew that the preference would have a greatly disproportionate impact on men and women.[18] The Court noted that the legislature must have been aware that "most veterans are men" and that "[i]t would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable." *Id.* at 278. Despite these facts, the plaintiff had not and could not show the presence of invidious intent in the constitutional sense.

> "Discriminatory purpose," . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

[18] This Court has expressly applied *Feeney*'s interpretation of invidious intent to race-based equal protection claims. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 298 (1987).

Id. at 279 (citations omitted). Because there was no allegation that any part of the state's purpose was to harm women, as opposed to benefitting veterans, the plaintiff had failed to state an equal protection claim.

Feeney thus clearly distinguished situations where (as in *Feeney*) a legislature acts to aid one group without any affirmative intention of harming another and those in which at least part of the legislature's purpose in acting is to harm a targeted group. Invidious intent "means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive." *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 (1982) (discussing concept in constitutional and Title VII disparate treatment cases). Government acts with invidious racial intent only if the decision challenged was made because the decisionmaker viewed the negative effects on a racial group as a "good" that it was pursuing.[19] In cases involving redistricting, the Court repeatedly has held that a legislative apportionment denies equal protection only if its affirmative purpose is "to minimize or cancel out the voting potential of racial or ethnic minorities." *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (plurality opinion). *Accord, Rogers v. Lodge*, 458 U.S. at 617.

The Court's most recent decision interpreting the concept of invidious intent reaffirmed the *Davis-Feeney* understanding. In *Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 113 S.

[19] *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 617 (1982) (intent shown if the state action is a "purposeful device to further racial discrimination"); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971) (same); *City of Richmond v. United States*, 422 U.S. 358, 378 (1975) (Constitution forbids actions that constitute "gross racial slurs, the only point of which is 'to despoil colored citizens'"). *See* Brest, *In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 13 (1976) (legislature acts with unconstitutional racial purpose when it gives "positive weight to the impermissible factor of racial prejudice").

Ct. 753 (1993),[20] the Court held that anti-abortion protesters could not be found liable under 42 U.S.C. § 1985(3), because opposition to abortion is not a form of the "class-based, invidiously discriminatory animus" (in the *Bray* context, animus against women) required under the statute. *Id.* at 758. The respondents had not shown that the protesters' actions embodied "a purpose that *focuses upon* women by reason of their sex" or were motivated "by a purpose (malevolent or benign) *directed specifically* at women as a class." *Id.* at 758 (emphasis added). The Court stressed the link between invidious animus and "hatred of or condescension toward" the class against whom the animus supposedly is directed, *id.* at 760, and cited *Feeney* for the familiar proposition that awareness of or even indifference about the disparate impact on a protected class does not constitute invidious intent. *Id.* at 760-61 & n.4.[21] In the light of *Bray*, it is clear that the District Court below correctly dismissed the Plaintiffs' complaint: the Plaintiffs have not alleged that the legislature's purpose was "focused upon" or "directed specifically at" white voters as a class, and still less that the legislature was motivated by

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[20] Although *Bray* is a statutory decision, its discussion is fully relevant to the present case because the Court itself equated the "invidiously discriminatory animus" necessary to state a § 1985(3) claim and the invidious intent required in alleging an equal protection violation. *See Bray*, 113 S. Ct. at 760-61 & n.4.

[21] As the *Bray* Court noted, the concept of invidious purpose or animus is not a psychological one. "We do not think that the 'animus' requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious) discrimination against women. It does demand, however, at least a purpose that focuses upon women by reason of their sex." *Id.* at 759. A decisionmaker whose intent was to prevent minority citizens from voting would be acting on the basis of an "objectively invidious" intent even if he or she genuinely believed that those citizens would be better off without the franchise. What is missing from the Plaintiffs' allegations is the element of adverse focus which *Bray* emphasized as essential: the Plaintiffs have not alleged that the legislature acted with a purpose "that focuses upon [white voters] by reason of their [race]."

"hatred of or condescension toward" white voters. Their complaint, therefore, does not allege a violation of equal protection.

The Plaintiffs, with admirable candor, have not made the facially implausible allegation that the white-majority North Carolina General Assembly that enacted the Plan did so "because of" its supposed adverse effects on white voters (*Feeney*) or "to further racial discrimination" against white voters (*Rogers*). In the terms this Court employed in *Feeney*, the Plaintiffs' argument is that the legislature's "invidious" intent was its race-conscious decision to create two majority-minority districts "in spite of" any adverse effect on white voters. *See* Comp. ¶ 36(A). The Plaintiffs thus are asking the Court to repudiate the settled understanding of invidious intent. They have not, however, successfully executed the difficult task of demonstrating why this Court should discard so central an element of constitutional law.

B. The Plaintiffs' Arguments in Support of Their Proposed Revision of Equal Protection Doctrine Are Unconvincing.

1. Plaintiffs' Revisionist Interpretation of Invidious Intent is Contrary to The History and Purpose of the Equal Protection Principle.

The Plaintiffs propose that this Court adopt the principle that the Constitution imposes a blanket prohibition on all race-conscious governmental action, and in support of this proposal, they suggest that the Equal Protection Clause already mandates what they call a "color-blind Constitution." Pl.Br. at 33-34.[22]

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[22] The terminology of "color-blindness" comes most immediately, of course, from the first Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Justice Harlan's famous statement that "Our Constitution is color-blind,"

(continued...)

This proposal is contrary both to the original meaning of the Equal Protection Clause and to the cases interpreting the Clause. As both this Court and many commentators have observed, "[t]he concept of benign race-conscious measures . . . is as old as the Fourteenth Amendment." *Metro Broadcasting v. FCC*, 497 U.S. 547, ___, 110 S. Ct. 2997, 3008 n.12 (1990).[23] There is little or no basis on which to argue that the original intent of the framers and ratifiers of the Fourteenth and Fifteenth Amendments was to prohibit all race-conscious measures intended to benefit racial minorities.[24]

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[22](...continued)
id. at 559, is not the clear endorsement of a *per se* ban on race-conscious state action that the Plaintiffs take it to be. The substantive ground of Harlan's objection to *de jure* racial segregation was that segregation laws "proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed" to associate with white citizens. *Id.* at 560. Harlan would have ruled the segregation law at issue in *Plessy* unconstitutional precisely because its makers had acted "because of" the law's adverse effects on black citizens: Harlan's "color-blind Constitution" embodied the *Feeney* principle of invidiousness rather than the Plaintiffs' proposed revision. *See also id.* at 563 (Harlan, J., dissenting) (majority's decision upholds legislation "conceived in hostility to, and enacted for the purpose of humiliating, citizens of the United States of a particular race").

[23] *See, e.g.*, Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 315 (1991) (neither language nor history of Equal Protection Clause requires "conclusion that all racial classifications are suspect"); Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985) (the original understanding of the Amendment did not prohibit all race-conscious legislation); Ely, *The Constitutionality of Reverse Race Discrimination*, 41 U. Chi. L. Rev. 723, 728 (1974) ("historical meaning and function" of the Fourteenth Amendment was to prohibit "discrimination against Blacks," not to ban all race-conscious measures).

[24] As Judge Richard Posner once observed, the original-intent argument against non-invidious race-conscious measures "ha[s] no leg to stand on." Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 21-22. The most recent study to address the historical questions concludes that the evidence about the Fourteenth Amendment's original purpose "tends strongly to refute" the contention that "the

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The Court's seminal equal protection case, *Strauder v. West Virginia*, 100 U.S. 303 (1879), described the Reconstruction amendments' ban on racial discrimination as conferring on African-Americans "the right to exemption from unfriendly legislation against them distinctively as colored," *id.* at 307-08, not as a blanket prohibition on race-conscious legislation. *Cf. City of Memphis v. Greene*, 451 U.S. 100, 128 (1981) (foreseeable disparate impact on racial minority did not amount to "a form of stigma so severe as to violate the Thirteenth Amendment"). The holding in *Washington v. Davis* that allegation and proof of invidious purpose is a necessary part of an equal protection case merely "reaffirmed a principle well-established in a variety of contexts." *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). *See* Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 295 (1991) (*Davis* restated "the traditional understanding of equal protection rights [that] acknowledged a constitutional violation only when a particular group had been *deliberately* disadvantaged"). The Fifteenth Amendment cases are equally clear: in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), for example, the Court held that the plaintiffs had stated a cause of action because their allegations, if proven, showed that the legislature had "single[d] out a readily isolated segment of a racial minority for special discriminatory treatment" and had redrawn municipal boundaries in order to deprive black citizens "of the benefits of residence" within the city

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[24](...continued)
Fourteenth Amendment was intended by its framers to require color blindness on the part of government." A. Kull, *The Color-Blind Constitution* vii (1992). *See id.* at 53-87 (discussing the evidence). Professor Kull's evident sympathy on principle for a *per se* ban on race-consciousness, *id.* at 220-24, renders his historical conclusions about it particularly persuasive.

as a voting unit. *Id.* at 346, 341.[25] *See also Bolden*, 446 U.S. at 62 (plurality opinion); *id.* at 102 (White, J., dissenting).

The requirement that plaintiffs allege the presence of an actual and invidious intent in order to state an equal protection claim plays a central role in equal protection doctrine. First, it directly embodies the "central purpose" of the Equal Protection Clause, *Davis*, 426 U.S. at 240, which is to deny any "legitimacy" to an "official action . . . taken for the purpose of discriminating *against* [African-Americans] on account of their race." *City of Richmond v. United States*, 422 U.S. 358, 378 (1975) (emphasis added). Recent decisions have stressed that the Clause's command is general and thus protects all racial groups. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-96 (1989) (plurality opinion). Those very decisions, however, have reiterated the Court's insistence that the concern of the equal protection principle is with the pernicious effects of "illegitimate racial prejudice or stereotype" in public decisionmaking. *Id.* at 493.

The invidious intent requirement also serves a crucial role in defining those governmental decisions susceptible to invalidation on equal protection grounds. If simple awareness that a decision will have a racially disproportionate effect satisfied the intent requirement, many governmental programs would be vulnerable to challenge despite their legitimate purposes. *See Davis* (rejecting a claim based on racially disparate effects of standardized testing);

[25] Contrary to Plaintiffs' reading of *Gomillion*, Pl.Br. at 30-31, that decision did not rest on a *per se* ban on race-consciousness, but on the adequacy for Fifteenth Amendment purposes of an allegation that the redrawn municipal boundaries in dispute were "a device to disenfranchise Negro citizens" literally, by placing them outside the city limits. 364 U.S. at 341. *See* Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. Chi. L. Rev. 935, 951-52 (1989) (*Gomillion* concerned the pretextual use of district lines for covert purpose of disqualifying black voters).

McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting a claim based on statistical disparities in racial impact of capital sentencing law). The Plaintiffs' proposed redefinition of invidious intent would broaden the range of potential equal protection claims in a fashion unjustified by reference to the central purpose of the equal protection principle. The definition they would have this Court adopt lacks principled limits in a world in which governmental units have increasing access to sophisticated data about the racial and other consequences of their decisions. *Gaffney v Cummings*, 412 U.S. 735, 753-54 (1973) (inevitable that lawmakers know the political impact of the districts they create). The Plaintiffs have offered no persuasive reason why this Court should overrule the many cases establishing the meaning of invidious intent and replace them with a concept fraught with uncertainty.

2. This Court's Decisions Do Not Compel or Even Support the Plaintiffs' Reinterpretation of the Invidious Intent Requirement.

The Plaintiffs base much of their argument on a faulty understanding of the cases they cite and deny the relevance of the decision the District Court held to be "directly on point." J.S. App. at 19a. None of the decisions that supposedly advance their contention that the Constitution should be read to impose a *per se* ban on race-conscious redistricting in fact does so.[26] In particu-

[26] This Court's one-person, one-vote decisions, Pl.Br. at 22-29, simply are not relevant to a race-based equal protection claim, and Plaintiffs did not and could not allege that the State's congressional districts do not satisfy the equal population mandate of Article I Section 2. *See Beer v. United States*, 425 U.S. 130, 142 n.14 (1976) (one-person, one-vote decisions "are not relevant" in evaluating a race-based challenge to legislative reapportionment); *Davis v. Bandemer*, 478 U.S. 109, 150 (1986) (O'Connor, J., concurring) (there is no "vote dilution" in the *Reynolds v. Sims* sense as long as the equal population requirement is satisfied).

lar, the Court's recent line of decisions forbidding the racially discriminatory use of peremptory challenges, on which the Plaintiffs place special emphasis, Pl.Br. at 33-39, expressly rest on and endorse the *Feeney* understanding of invidious intent. *See, e.g., Hernandez v. New York*, 500 U.S. ___, ___, 111 S. Ct. 1859, 1866 (1991).[27]

The Plaintiffs seek to avoid the authority of *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), which, as the District Court noted, "flatly foreclose[s]" their claim. J.S. App. at 19a. In *U.J.O.*, the Attorney General denied preclearance to a state redistricting plan and in turn "the State sought to meet what it understood to be the Attorney General's objections and to secure his approval" by creating additional majority-minority districts. *Id.* at 151. When the Attorney General precleared the revised plan, white voters[28] challenged it as a racial gerrymander violating the Fourteenth and Fifteenth Amendments, and this Court held that they had failed to state a claim. A majority of the Court applied the traditional *Washington v. Davis* understanding of unconstitutional discrimination and agreed that the *U.J.O.* plaintiffs

[27] Recent decisions applying heightened scrutiny to affirmative action programs, Pl.Br. at 52-53, are also consistent with the traditional understanding of invidious intent. *Croson*, 488 U.S. at 493 (purpose of strict scrutiny is to "'smoke out' illegitimate uses of race"). *Cf. Lamprecht v. FCC*, 958 F.2d 382, 393 n.3 (D.C. Cir. 1992) (Thomas, Circuit Justice) (purpose of heightened scrutiny of sex-based affirmative action is to insure that the measure is not based on "archaic stereotypes"). The *Croson* line of decisions, in other words, employs strict scrutiny in order to determine whether the hidden motivation behind the overt use of race to distribute public goods is in fact invidious in the *Davis-Feeney* sense.

[28] Although the plaintiffs in *U.J.O.* were members of a Hasidic Jewish community that was fractured by the state's new plan, the only contention presented to this Court was that "the use of racial criteria by the State of New York in its attempt to comply with § 5 of the Voting Rights Act" was unconstitutional discrimination against white voters. 430 U.S. at 148.

had not alleged an invidious racial intent to harm white voters: "There is no doubt that in preparing the 1974 legislation the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race." *Id.* at 165 (White, J., joined by Stevens and Rehnquist, JJ.). *See id.* at 179-80 (Stewart, J., joined by Powell, J.).[29] A slightly different majority agreed that the state's plan was valid because it was enacted in order to comply with § 5 of the Voting Rights Act. *See id.* at 159-61 (White, J., joined by Brennan, Blackmun, and Stevens, JJ.); *id.* at 180 (Stewart, J., joined by Powell, J.).[30]

The Plaintiffs deny the dispositive force of *U.J.O.* in several ways, none of which is persuasive. Their suggestion that the decision is "a dangerous relic from the past," Pl.Br. at 40, incorrectly treats *U.J.O.* as though it were an isolated case out of step with the rest of this Court's jurisprudence: in fact, *U.J.O.* is a consistent application both of the general principle of invidious intent and of the Court's specific interpretation of § 5. *See infra*, at 27-31. The Plaintiffs' lengthy discussion of the social risks that may be associated with race-conscious redistricting, Pl.Br. at 41-46, is an argument about the policies that the United States Congress and the North Carolina General Assembly have adopted, and it is sufficient to reply that such policy considerations are

[29] This same majority of Justices thus recognized the affirmative power of the states to use race-conscious redistricting to protect the voting power of racial minorities. *See* 430 U.S. at 165-68 (White, J.); *id.* at 180 & n.* (Stewart, J.).

[30] In fact, the lone dissenter in *U.J.O.*, Chief Justice Burger, accepted the constitutionality of race-conscious redistricting that is "reasonably necessary to assure compliance with federal voting rights legislation," *Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980) (Burger, C.J.) (citing his dissent in *U.J.O.*), and objected only to the fact that the state had "mechanically adhered" to a 65% figure for creating adequate majority-minority districts. *U.J.O.*, 430 U.S. at 183 (Burger, C.J., dissenting).

within the competence of legislatures to weigh.[31] Their observation that Durham County, in which they live, is not covered by § 5, *id.* at 65-66, is not germane since they are challenging a statewide plan that must be precleared.[32]

The Plaintiffs also suggest that this Court's affirmative action decisions have in some fashion undermined the validity of the cases approving race-conscious redistricting, *id.* at 48, 63; however, they neither explain nor even acknowledge the fact that Justices of this Court have repeatedly observed that the continuing validity of cases such as *U.J.O.* is unaffected by the Court's application of heightened scrutiny in the affirmative action context. *See Metro Broadcasting*, 110 S. Ct. at 3019; *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring in the judgment); *Fullilove v. Klutznick*, 448 U.S. 448, 524 n.3 (1980) (Stewart, J., dissenting); *Regents of Univ. of*

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[31] The Plaintiffs remark with considerable understatement that their policy arguments "are not of themselves a complete justification for" invalidating the State's Plan, but suggest that those arguments support their legal contentions. Pl.Br. at 45-46. They fail to acknowledge that responsible commentators vigorously contest their views. A recent study of race-conscious redistricting under the Voting Rights Act, for example, concludes that "there seems to be no factual basis for asserting that enforcement of the Voting Rights Act has led to an *increase* in racial polarization by making race a more salient feature of politics than it had been previously." B. Grofman, L. Handley & R. Niemi, *Minority Representation and the Quest for Voting Equality* 132 (1992). In any event, the responsibility for weighing the costs and benefits of the Act belongs to Congress. *Cf. Gingles v. Edmisten*, 590 F. Supp. 345, 356-57 (E.D.N.C. 1984), *rev'd in part on other grounds sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986): in eliminating an intent requirement from § 2, "Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values [including the risk that] the imposing of affirmative obligation upon government to secure [minority group voting] rights by race-conscious electoral mechanisms was alien to the American political tradition."

[32] In determining the validity of a statewide redistricting plan, it is necessary to look at the "overall effect" statewide and not merely at isolated areas. *Connor v. Finch*, 431 U.S. 407, 427 (1977) (Blackmun, J., concurring in the judgment).

California v. Bakke, 438 U.S. 265, 304-05 (1978) (Powell, J.). *U.J.O.* is entirely consistent with this Court's current understanding of the equal protection principle, and under it the Plaintiffs plainly have not stated a cause of action.

C. The Plaintiffs' Proposed Reinterpretation of Invidious Intent Would Require This Court to Invalidate Key Provisions of the Voting Rights Act And To Repudiate Its Decisions Interpreting the Act.

The Plaintiffs assert that "if the Voting Rights Act does permit or authorize a State legislature to create Congressional Districts with [a race-conscious] intent or purpose," the Act should be held unconstitutional "to that extent and in that regard." Amendment to Comp. ¶ 2(A), J.S. App. at 104a-05a. In making such an argument, the Plaintiffs ask this Court to reject the considered constitutional judgment of the successive Congresses that have extended and strengthened the Act and to repudiate its own precedents recognizing the validity of race-conscious state action taken in order to comply with the Act. The Plaintiffs have not carried the very heavy burden of persuasion that they have undertaken.

1. States Covered By the Preclearance Requirements of the Voting Rights Act Have the Constitutional Authority to Create Majority-Minority Districts in Order to Fulfill Their Section Five Obligations.

"[T]he Fifteenth Amendment places responsibility on the states for protecting voting rights," Senate Report No. 97-417, reprinted in 1982 U.S. Code Cong. & Admin. News 235 (hereaf-

ter "Sen.Rep. 97-417").[33] However, in addition to this fundamental constitutional responsibility, § 5 of the Voting Rights Act places additional responsibilities and limitations on certain states.[34] Section 5 imposes on covered jurisdictions an affirmative obligation to demonstrate that changes in their electoral laws are free both of invidious purpose and of discriminatory effect. *See McCain v. Lybrand*, 465 U.S. 236, 247 (1984); *Beer v. United*

[33] Legislative redistricting, including the reapportionment of seats for the United States House of Representatives, is "primarily the duty and responsibility of the State," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), and state legislatures have plenary authority within constitutional limits to pursue legitimate goals and implement state policies. *White v. Weiser*, 412 U.S. 783, 795 (1973); *Carrington v. Rush*, 380 U.S. 89, 91 (1965). Even in the absence of the Voting Rights Act, it would seem that states could employ non-invidious race-conscious measures in order to eliminate the effects of racial discrimination on the access of minority group members to the electoral process. *See U.J.O.*, 430 U.S. at 165-68 (White, J.); *City of Rome v. United States*, 446 U.S. 156, 212 n.5 (1980) (Rehnquist, J., dissenting). In *Gaffney v. Cummings*, the Court rejected a political gerrymandering challenge to a redistricting plan intended to create a fair balance between the major political parties. In doing so, the Court emphatically stated with respect to "racial or political groups" that "neither we nor the district courts have a constitutional warrant to invalidate a state plan . . . because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." 412 U.S. at 754. The Court's seminal racial vote-dilution decisions under the Constitution also concluded that where "an identifiable racial or ethnic group had an insufficient chance to elect a representative of its choice . . . district lines should be redrawn" as a remedy. *Davis v. Bandemer*, 478 U.S. 109, 124 (1986) (analyzing earlier cases). *See also id.* at 151 (O'Connor, J., concurring) (members of "a racial minority group [that] is characterized by 'the traditional indicia of suspectness' and is vulnerable to exclusion from the political process" are entitled to "some measure of protection against intentional dilution of their group voting strength"). Plaintiffs do not even discuss why these cases, and the Court's identification of "fair group representation" as a value of constitutional dimensions, *Bandemer*, 478 U.S. at 125 & n.9, do not provide an adequate basis for the State's race-conscious redistricting.

[34] States or local governmental units are covered if they have an identifiable history of discrimination under the criteria established by Section 4 of the Act, 42 U.S.C. § 1973b.

States, 425 U.S. 130 (1976). Because § 5 coverage rests on findings that a jurisdiction has "engaged in certain violations of the Fifteenth Amendment," *McCain*, 465 U.S. at 244-45, covered jurisdictions have a "constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination." *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring in the judgment) (discussing *U.J.O.*).[35] North Carolina is, in effect, a covered jurisdiction for congressional redistricting purposes, and thus the legislature's general authority to redistrict and to protect voting rights is reenforced by its responsibility and power to satisfy the requirements of § 5.

This Court approved the creation of majority-minority districts as a means of satisfying a covered jurisdiction's obligations under § 5 in the leading case construing the provision. *Beer v. United States*, 425 U.S. 130 (1976), concluded that § 5 forbids the implementation of a redistricting plan that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 141. Under that standard, the Court held that the plan under review in

[35] Jurisdictions covered by § 5 of the Voting Rights Act thus are under an affirmative obligation to eliminate the vestiges of past racial discrimination in their electoral systems that parallels the "duty and responsibility of a school district once segregated by law . . . to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system." *Freeman v. Pitts*, ___ U.S. ___, 112 S. Ct. 1430, 1443 (1992). The Plaintiffs' statement that the legislature had no basis on which to believe that official racial discrimination has infected North Carolina's congressional elections, Pl.Br. at 19, flies in the face of the fact that forty counties in the State are covered under the Act and that as a result all statewide redistricting must be precleared. The 1982 extension of § 5 was based on Congress's conclusion that maintaining its affirmative obligations "is still vital to protecting voting rights in the covered jurisdictions." *See* Sen.Rep. 97-417 at 186-92 (discussing Congress's decision to extend § 5 but not to make it nationwide because of its "extensive Congressional findings of voting discrimination" in covered jurisdictions).

Beer, which created a majority-minority district where none had existed before, was "an ameliorative new legislative apportionment [which] cannot violate section 5 unless the new apportionment so discriminates on the basis of race or color as to violate the Constitution." The "ameliorative" aspect of the *Beer* reapportionment consisted in the fact that it involved deliberate, race-conscious redistricting for the purpose of creating a majority-minority district and thus "enhanc[ing] the position of racial minorities." *Id.* at 141. *See* App. in *Beer v. United States*, O.T. 1975, No. 73-1869, at 341-42 (district lines intentionally drawn to attain at least a 54% black majority in one district).[36]

This Court's other § 5 decisions echo *Beer*'s approval of race-conscious redistricting for the purpose of complying with § 5. In *City of Richmond v. United States*, for example, the Court held that a city could satisfy § 5's requirements where annexations of new territory decreased the overall percentage of black voters by adopting a race-conscious post-annexation redistricting plan that purposefully assured black voters "representation reasonably equivalent to [their] political strength in the enlarged community." 422 U.S. at 370-71. *Accord, City of Port Arthur v. United States*, 459 U.S. 159, 167 (1982) (approving race-conscious redistricting to insure that the plan "adequately reflected the political strength of the black minority;" *id.* at 171, 175 (Powell, J., dissenting) (same); *U.J.O.*, 430 U.S. at 159-61 (White, J.); *id.* at 180 (Stewart, J.); *id.* at 183 (Burger, C.J., dissenting); *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd mem.*, 410 U.S. 962 (1973). *See also Upham v. Seamon*,

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[36] "[A]ll eight Justices who participated in [*Beer*] implicitly accepted the proposition that a State may revise its reapportionment plan to comply with § 5 by increasing the percentage of black voters in a particular district until it has produced a clear majority." *U.J.O.*, 430 U.S. at 160 (White, J.).

456 U.S. 37, 43 (1982) (in devising a congressional reapportionment plan after the Attorney General objected to the legislature's plan, the district court erred by failing to follow the legislature's decision to create a majority-minority district). The state Defendants' research indicates that other courts have uniformly accepted this understanding of the states' authority. *See, e.g., Texas v. United States*, 802 F. Supp. 481, 486 (D.D.C. 1992); *Wilson v. Eu*, 823 P.2d 545, 550-51, 582 (Cal. 1992).

Section 5 requires covered jurisdictions to avoid all changes in their election laws that have the effect of weakening the voting strength of voting minorities, and the burden rests on the jurisdiction to demonstrate that it has done so. Carrying out this task is impossible in many redistricting situations unless the jurisdiction takes race into account. This Court therefore has consistently approved the use of race-conscious measures by covered jurisdictions to satisfy their obligations under § 5.[37] The Plaintiffs' argument necessarily asks the Court to repudiate all of those decisions and, finally, to reject the constitutionality of § 5 itself.[38]

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[37] The Senate Report accompanying the 1982 bill extending the Act noted that covered states possess "plenary power . . . to meet the standards of the Act." Sen.Rep. 97-417 at 235.

[38] The Plaintiffs' claim that the implication of affirming the District Court will be to leave voters without a remedy against unconstitutional racial gerrymandering by state legislatures, Pl.Br. at 76-78, is baseless. This case does not present the Court with the specter of the Attorney General imposing, and the state legislature accepting, an unreasonable or outrageous prerequisite for preclearance, and it is contrary both to the structure of the Voting Rights Act and to principles of federalism gratuitously to assume that either the federal or the state officials would act in such a fashion. *See Morris v. Gressette*, 432 U.S. 491, 506 n.23 (1977). This case involves no allegation that the legislature's public goal of complying with § 5 of the Voting Rights Act was a pretext for a different, covert and unconstitutional purpose, and thus the District Court's decision in no way

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2. The Results Test of Section Two Requires States to Take Race Into Account in Redistricting in Order to Comply With the Section.

Section 2 of the Act was amended in 1982 to provide that no voting "standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a).[39] In *Gingles*, this Court unanimously interpreted amended § 2 to prohibit state apportionment plans that dilute the voting strength of racial minorities by "caus[ing] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." 478 U.S. at 47. *See id.* at 87-88 (O'Connor, J., concurring in the judgment).[40]

The "results" test of amended § 2 necessarily requires legislatures and courts attempting to comply with it to take race into account when redistricting. *See Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359-60 (7th Cir. 1992); *DeGrandy v.*

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[38](...continued)
compromises the cognizability of claims based on an allegation of invidious intent in the traditional *Davis-Feeney* sense. *Cf. Quilter v. Voinovich*, 794 F. Supp. 695, *prob. jur. noted*, 112 S. Ct. 2299 (1992), where allegations of pretext were made.

[39] The 1982 amendment was a response to this Court's decision in *City of Mobile v. Bolden* that § 2 was coextensive with the Fifteenth Amendment and that consequently to show a violation of the section a plaintiff would have to prove invidious intent. 446 U.S. at 61 (plurality opinion). Congress amended § 2 because, among other reasons, it concluded that the intent requirement "place[d] an unacceptably difficult burden on plaintiffs." Sen.Rep. 97-417 at 193.

[40] While *Gingles* involved a challenge to multi-member legislative districts, other cases have upheld the application of the concept of vote dilution to challenges to the apportionment of single-member districts. *See, e.g., Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd mem.*, 111 S. Ct. 662 (1991).

Wetherell, 794 F. Supp. 1076 (W.D. Fla. 1992), *appeal pending as Wetherell v. DeGrandy*, No. 92-519.[41] As Justice O'Connor observed in *Gingles*, "the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice." 478 U.S. at 87 (opinion concurring in the judgment). The use of race-conscious redistricting thus is necessary if states are to be able to obey the mandate of amended § 2. Where necessary to avoid a situation in which members of a racial or linguistic minority have "less opportunity than other members of the electorate . . . to elect representatives of their choice," 42 U.S.C. § 1973(b), "[t]he deliberate construction of minority controlled districts is exactly what the Voting Rights Act authorizes." *Garza v. County of Los Angeles*, 918 F.2d 763, 776 (9th Cir. 1990). Numerous courts, therefore, have approved, ordered or implemented race-conscious apportionments that create majority-minority districts. *See, e.g., Wesch v. Hunt*, 785 F. Supp. 1491, 1498-99 (S.D. Ala. 1992), *aff'd mem. sub nom. Camp v. Wesch*, 112 S. Ct. 1926 (1992); *Baird*, 976 F.2d at 359-60; *Jeffers*, 730 F. Supp. at 217; *DeGrandy*, 794 F. Supp. at 1085; *Wilson v. Eu*, 823 P.2d at 549.

The North Carolina General Assembly was obligated, of course, to draw congressional districts that would not have the effect of diluting minority voting strength in order to comply with the mandates of § 2 and § 5. *See* 28 C.F.R. § 51.55(b)(2) (1992) (under § 5, Attorney General will deny preclearance to plans presenting clear violations of § 2). Faced with strong evidence of

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[41] The legislative history of the 1982 amendment indicates that Congress was aware of the fact that it was sanctioning majority-minority districts in appropriate circumstances. *See* Sen.Rep. 97-417 at 208 & n.121 (citing cases in which courts employed such districts in order to assure minority representation).

the existence of racially polarized voting in the State's elections, *see Gingles*, 478 U.S. at 80, the legislature had no other means of meeting that obligation. The Plaintiffs' reinterpretation of the invidious intent requirement would render all such attempts to comply with the Act unconstitutional. Since it is scarcely conceivable that Congress constitutionally can impose an obligation on the states that they cannot constitutionally fulfill, Plaintiffs' argument is in effect a challenge to the validity of §§ 2 and 5.[42]

3. Sections Two and Five of the Voting Rights Act Are Constitutional, and the Plaintiffs' Challenge to Their Validity Should Be Rejected.

Sections 2 and 5 both require race-conscious redistricting, and in appropriate circumstances the creation of majority-minority districts, on the part of the states. The Plaintiffs' argument that the Constitution bars race-conscious redistricting is therefore an attack on the validity of those two key provisions of the Voting Rights Act. The constitutionality of that Act has been addressed on more than one occasion by this Court, and each time the Court has sustained the Act as an exercise of Congress's enforcement powers under the Reconstruction era amendments. *See City of Rome*; *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).[43] It

[42] The states' constitutional power to meet the requirements of the Act is an unavoidable implication of Congress's power to enact it. "The government which has a right to do an act, and has imposed upon it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409-10 (1819).

[43] *South Carolina* and *City of Rome* sustained the pre-1982 version of the Act as an exercise of the enforcement power granted Congress by § 2 of the Fifteenth Amendment. *See, e.g., City of Rome*, 446 U.S. at 177. When Congress (continued...)

is settled law that Congress possesses the authority under the Reconstruction era amendments to impose obligations and prohibitions on the states in the area of voting rights that go beyond the Fourteenth and Fifteenth Amendments' ban on invidiously intended discrimination. *City of Rome*, 446 U.S. at 177. Congress crafted §§ 2 and 5 of the Voting Rights Act in light of this principle and of the Constitution's guarantee to "racial minorities [of] the right to full participation in the political life of the community." *Washington v. Seattle School District No. 1*, 458 U.S. 457, 467 (1982). This Court should reject the Plaintiffs' request that it discard its own precedents and overturn the considered constitutional judgment of Congress.[44]

[43](...continued)
amended the Act in 1982, it did so in part on the basis of a considered legislative judgment that the amendment properly rested on the enforcement powers granted Congress by § 5 of the Fourteenth Amendment as well. *See* Sen.Rep. 97-417 at 217-21. *See also Briscoe v. Bell*, 432 U.S. 404, 414-15 (1977) (Act rests in part on Fourteenth Amendment powers). The Act therefore is entitled to the special deference this Court accords exercises of Congress's "unique remedial powers . . . under section 5." *Croson*, 488 U.S. at 488 (O'Connor, J.). *See also id.* at 521-23 (Scalia, J., concurring in the judgment); *Metro Broadcasting*, 110 S. Ct. at 3008; *id.* at 3030 (O'Connor, J., dissenting); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

[44] The 1982 Congress that amended § 2 and extended the entire Act carefully addressed the question of its constitutional authority to do so. *See* Sen.Rep. 97-417 at 217-21, 239-40.

II. THE STATE'S CONGRESSIONAL REDISTRICTING PLAN IS CONSTITUTIONAL EVEN ON THE ASSUMPTION THAT THE PLAINTIFFS ADEQUATELY HAVE ALLEGED DISCRIMINATORY INTENT BECAUSE THEY CANNOT ALLEGE DISCRIMINATORY EFFECT.

In addition to holding that the Plaintiffs failed to state a claim because they could not allege invidious intent, the District Court dismissed the Plaintiffs' complaint on a second and independent ground: "Neither have they alleged, nor could plaintiffs prove, the requisite unconstitutional effect under the facts indisputably before us on this motion." J.S. App. at 23a. This holding is plainly correct. The State's Plan creates no obstacles to the Plaintiffs' full participation in the political process and demonstrably cannot have the effect of "cancelling out" the electoral strength of white voters statewide.

In the cases originally outlining the elements of a race-based equal protection claim, this Court held that plaintiffs must show that "the political processes leading to nomination and election [are] not equally open to participation by the group in question -- that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White v. Regester*, 412 U.S. 755, 766 (1973). The Court rejected arguments that an unconstitutional effect is shown by proving that a racial group is in the minority in a given district or that its preferred candidates lose elections: "the mere fact that one interest group or another concerned with the outcome of [the district's] elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where . . . there is no indication that this segment of the population is being denied access to the political system." *Whitcomb v. Chavis*, 403 U.S.

124, 154-55 (1971). *See also Chapman v. Meier*, 420 U.S. 1, 17 (1975) (plaintiffs must allege and prove "lessening or cancellation of voting strength" of group). The question of discriminatory effect is not determined by looking at particular "seats in isolation," *Lockhart v. United States*, 460 U.S. 125, 131 (1983) (§ 5 case), but by examining "the overall effect of the apportionment plan on the opportunity for fair representation of minority voters." *Connor v. Finch*, 431 U.S. 407, 427 (1977). In a case involving a statewide plan, therefore, the question of effect must be answered on a statewide basis. *Chapman*, 420 U.S. at 17; *Davis v. Bandemer*, 478 U.S. 109, 132-33 (1986) (plurality opinion). Recent decisions have adhered to the requirement that a viable equal protection claim must allege discriminatory effect as well as invidious intent. *Bandemer*, 478 U.S. at 119-20, 125-26;[45] *Turner v. Arkansas*, 784 F. Supp. 553, 579 (E.D. Ark. 1991) (dismissing claim because no showing of discriminatory effect), *aff'd mem.*, 112 S. Ct. 2296 (1992); *Gingles v. Edmisten*, 590 F. Supp. 345, 352 n.8 (E.D.N.C. 1984) ("dilutive effect remains an essential element of constitutional . . . claims"), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986).

Under these decisions, the District Court's conclusion that the Plaintiffs have not made and cannot make the necessary allegation of discriminatory effect is plainly correct. The Plaintiffs' challenge necessarily is to the State's congressional reappor-

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[45] The *Bandemer* plurality opinion emphatically reaffirmed "the effects discussion we adopted earlier." 478 U.S. at 139 n.17. "[W]e have found equal protection violations only where a history of disproportionate results appeared in conjunction with strong indicia of lack of political power and the denial of fair representation. In those cases, the racial minorities asserting the successful equal protection claims had been essentially shut out of the political process." *Id.* at 139. The Plaintiffs' inability to allege that the racial group to which they belong has been "shut out" of the State's political process is fatal to their attempt to state a race-based equal protection claim.

tionment Plan, and thus the focus for determining discriminatory effect must be a statewide one. Viewed from that perspective, it is evident that the Plan does not have the effect of "cancel[ling] out or minimiz[ing] the voting strength" of the State's white citizens. *White*, 412 U.S. at 765. The creation of two majority-minority districts (out of twelve) obviously does not "consign" the white majority "to minority status," *Bandemer*, 478 U.S. at 125 n.9, and will not result in the proportional underrepresentation of white voters on a statewide basis. *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 (1977) (White, J.).[46] The "mere fact" that those Plaintiffs who live in a majority-minority district will find themselves "outvoted," *Whitcomb*, 403 U.S. at 154, would not state an unconstitutional effect even if it were more than mere conjecture. Their suggestion that Congresspersons elected under the Plan will not provide proper representation for white citizens, Pl.Br. at 39 n.10, 44-45, is an unacceptable speculation. "We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters. This is true even in a safe district where the losing group loses election after election." *Bandemer*, 478 U.S. at 132 (plurality opinion). This Court may take judicial notice of

[46] The Plaintiffs suggest that the fact that there is a rough correspondence between the number of majority-minority districts under the Plan and the percentage of African-Americans in North Carolina's population renders the Plan suspect or invalid. Pl.Br. at 31-33. While this Court has repeatedly rejected arguments that racial groups are *entitled* to proportional representation, *e.g.*, *White*, 412 U.S. at 765-66, it does not of course follow that proportional representation is unconstitutional. *See*, *e.g.*, *Bandemer*, 478 U.S. at 130-31 (Constitution permits but does not require redistricting to produce results reflecting statewide strength of political groups); *City of Mobile v. Bolden*, 446 U.S. 55, 86 n.6 (1980) (Stevens, J., concurring in the judgment). Similarly, the proviso in § 2 of the Voting Rights Act stating that the section does not create a *right* to proportional representation does not mean that the section forbids proportionality. *See*, *e.g.*, *McGhee v. Granville Co.*, 860 F.2d 110, 120-21 (4th Cir. 1988).

the fact that as white voters the Plaintiffs cannot present the evidence of "historical patterns of exclusion from the political processes" of the State that would support a claim of discriminatory effect. *Id.* at 131 n.12. *See also White*, 412 U.S. at 766-67; *Rogers v. Lodge*, 458 U.S. 613, 625-27 (1982).

The Plaintiffs' argument, if accepted, leads to a perverse and illogical result: Plaintiffs, members of the racial group that constitutes a strong majority in the State's population, would be able to state an equal protection claim more easily than members of racial minorities, who are obligated under this Court's decisions to allege and prove that they have "essentially been shut out of the political process" of the State as a whole. *Bandemer*, 478 U.S. at 139 (plurality opinion); *id.* at 151-52 (O'Connor, J., concurring in the judgment). The Plaintiffs do not explain this consequence, and they have not attempted to distinguish this Court's cases establishing the effects requirement or, indeed, to discuss those cases at all. The Plaintiffs have not alleged a racially discriminatory effect, and on that basis this action should be dismissed.

III. THE STATE'S CONGRESSIONAL REDISTRICTING PLAN IS CONSTITUTIONAL UNDER THIS COURT'S *CROSON* AND *METRO BROADCASTING* DECISIONS.

A. The *Croson* Test Does Not Apply to Race-Conscious Redistricting Pursuant to the Voting Rights Act.

The Plaintiffs argue in the alternative that the State's Plan is unconstitutional because it does not meet the requirements of this Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), which applied strict scrutiny to invalidate a municipal public contracting program that provided preferential

treatment for various minority groups. The Plaintiffs have provided no explanation of why this Court should apply the *Croson* test, which the Court has developed to evaluate the constitutionality of programs that distribute public goods explicitly on the basis of race, rather than the Court's many decisions outlining the analysis to be employed in cases such as this one alleging a racial gerrymander. *Croson* and its progeny are not applicable in the present case because the analyses those decisions establish were designed to address concerns not present in this context.

In the situations addressed by the affirmative action cases, this Court has been confronted with the explicit governmental use of race as the criterion for allocating public goods such as access to a state medical school, public employment or public contracts. The decisions display concern over three aspects of such programs: by making explicit use of race, they can undercut the core purpose of the Equal Protection Clause itself, *Croson*, 488 U.S. at 510-11; they may impose unfair costs on those who are denied public goods on the basis of race, *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 276 (1986) (plurality opinion); and unless carefully limited they have no "logical stopping point" short of outright racial balancing, *id.* at 275. In contrast, race-conscious redistricting for the purpose of compliance with the Voting Rights Act furthers the Constitution's guarantee to "racial minorities [of] the right to full participation in the political life of the community," *Washington v. Seattle School District No. 1*, 458 U.S. 457, 467 (1982), and does so without denying to any individual the "enjoyment of the relevant opportunity -- meaningful participation in the

electoral process." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 305 (1978) (Powell, J.).[47]

The "opportunity" to be in the racial majority in one's congressional district is not, of course, a free-standing public good to which anyone is entitled under the Constitution, and finding oneself in the minority is not in itself an injury.[48] The Voting Rights Act and the use of majority-minority districts that Act sanctions are "a rule hedging against racial discrimination," *Thornburg v. Gingles*, 478 U.S. 30, 83 (1986) (White, J., concurring), and they are limited, logically, geographically and temporally, by the existence of the very factors -- the demonstrable history of official discrimination, and the unfortunate continuance of racially polarized voting, in covered jurisdictions -- that brought them into existence. Because race-conscious redistricting in such circumstances does not present the concerns that animate the *Croson* line of cases, the opinions of this Court's members in the affirmative action cases consistently have treated such redistricting as outside the scope of the *Croson* analysis. *See Metro Broadcasting v. FCC*, 497 U.S. 547, ___, 110 S. Ct. 2997, 3019 (1990); *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring in the judgment); *Fullilove v. Klutznick*, 448 U.S. 448, 524 n.3 (1980)

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[47] For reasons already discussed, the Plaintiffs' speculations that representatives elected under the Plan will not provide adequate representation for the Plaintiffs or other white voters are an unacceptable basis for constitutional adjudication.

[48] The Plaintiffs' descriptions of the Plan as amounting to "the segregation of black from white voters," Pl.Br. at 31, and as creating a "racial quota," *id.* at 45, are simply incorrect. North Carolina's present congressional districts do not "segregate" voters by race any more than does any districting plan that creates, inadvertently or deliberately, districts in which there are local racial majorities and minorities -- which is to say most legislative districts on every level in the United States. Nor does the Plan impose any sort of "quota" in terms of voters, candidates or elected representatives.

(Stewart, J., dissenting); *Bakke*, 438 U.S. at 305 (Powell, J.). *Cf. City of Rome v. United States*, 446 U.S. 156, 212 n.5 (1980) (Rehnquist, J., dissenting) (states are "empowered to utilize racial criteria in order to minimize the effects of racial-bloc voting").[49]

B. The State Redistricting Plan Is Justified By the Compelling Governmental Interest in Complying With the Voting Rights Act and Remedying the Effects of Racial Discrimination.

Even if the *Croson* line of decisions properly applied to race-based challenges to reapportionment plans, the North Carolina Plan should be deemed constitutional because it is "justified by [the] compelling governmental interest" of eliminating the effects of racial discrimination and racially polarized voting in electoral politics and is "narrowly tailored to the achievement of that goal." *Wygant*, 476 U.S. at 274 (omitting citations).[50]

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[49] Many commentators agree that the constitutional issues presented by race-conscious redistricting are fundamentally different from those that exist in the affirmative action context. *See, e.g.*, D. Currie, *The Constitution in the Supreme Court: The Second Century* 485 n.150 (1990); O'Rourke, *The 1982 Amendments and the Voting Rights Paradox*, in B. Grofman & C. Davidson, *Controversies in Minority Voting* 107-08 (1992); Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 Mich. L. Rev. 1833, 1865 (1992) (protection of minority voting strength is directed toward correction of the political process and is thereby different from "purely outcome-driven civil rights claims against the distribution of goods and opportunities in this society"); Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 Calif. L. Rev. 171, 178 n.21 (1979) (distinguishing race-conscious redistricting in *U.J.O.* as "a special case" not addressed by the Court's general affirmative action jurisprudence).

[50] Because race-conscious redistricting is required in order to comply with §§ 2 and 5 of the Voting Rights Act, *supra*, at 27-34, if the affirmative action decisions actually applied in this situation, the proper standard of evaluation would be intermediate level scrutiny, not strict scrutiny. *See Metro Broadcasting*

(continued...)

This Court repeatedly has recognized that states have a compelling interest in eradicating racial discrimination and its effects from public life. *See, e.g., Croson*, 488 U.S. at 491-93. Before employing a racial classification, however, a legislature seeking to pursue that goal must have "a strong basis in evidence for its conclusion that remedial action was necessary." *Id.* at 500, quoting *Wygant*, 476 U.S. at 277. The legislature, on the other hand, need not make quasi-judicial findings about the existence of racial discrimination: what is required is that "the public actor ha[ve] a firm basis for believing that remedial action is required," *id.* at 286 (O'Connor, J., concurring in the judgment) (summarizing the view held by the Court as a whole). In *Croson* itself, the Court held that the defendant's affirmative action program did not satisfy the compelling-interest strand of strict scrutiny. A comparison of the deficiencies the Court identified in that program with the reapportionment Plan challenged in this case demonstrates that the Plan meets the compelling-interest requirement.

In *Croson*, this Court ruled unconstitutional a municipal program requiring the city's non-minority-owned prime contractors to subcontract at least 30% of the dollar amount of their construction contracts to one or more "minority business enterprises." 488 U.S. at 477-78. Although the program theoretically permitted contractors actually unable to fulfill its requirements to request a waiver, the stated standards for granting a waiver were stringent and the city administrator's discretion to deny a waiver was

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[50](...continued)
v. FCC, 110 S. Ct. at 3008-09 (intermediate level scrutiny to be used to evaluate affirmative action programs "approved -- indeed, mandated -- by Congress"). *See also id.* at 3030 (O'Connor, J., dissenting) (Congress "has considerable latitude, presenting special concerns for judicial review [when it] act[s] respecting the States" pursuant to § 5 of the Fourteenth Amendment). Because the State's Plan meets the more exacting standards of strict scrutiny, it necessarily satisfies the *Metro Broadcasting* test.

essentially plenary. *Id.* at 478-79. The program in effect imposed "a rigid numerical quota" reserving access to certain public-contract monies to racial minorities, thus denying them to non-minority contractors. *Id.* at 508.

Richmond's asserted compelling interest was the need to combat racial discrimination in the local construction industry. However, as the Court pointed out, the city based this need on "a generalized assertion" about "past discrimination in an entire industry," *id.* at 498; "sheer speculation" about the effects of past discrimination on present minority participation in the industry, *id.* at 499; and "the unsupported assumption that white prime contractors simply will not hire minority firms." *Id.* at 502. "There [was] nothing approaching a prima facie case of a constitutional or statutory violation" by the city itself in its administration of public contracts. *Id.* at 500. Congress's finding that there has been racial discrimination on a nationwide basis in the highway construction industry did not provide Richmond with the necessary "evidence that [its] own spending practices are exacerbating a pattern of prior discrimination" in the local general contracting market. *Id.* at 504. Because the city could point to no "identified discrimination in the Richmond construction industry," it could not invoke the need to eliminate such discrimination in support of a racial preference program. *Id.* at 505.

North Carolina, unhappily, has "sufficient evidence to justify the conclusion that there has been prior discrimination," *Wygant*, 476 U.S. at 277, in the State's political processes. The imposition of the preclearance requirement of § 5 of the Voting Rights Act is predicated on "extensive Congressional findings of voting discrimination in the covered jurisdictions," Sen.Rep. 97-417 at 192, and Congress's extension of the Voting Rights Act in 1982 reflects its considered judgment that such official discrimination and its effects remain a severe problem in jurisdictions that fall under the criteria for coverage. *Id.* at 191. *See McCain v. Lybrand*, 465 U.S. 236, 244-45 (1984). The fact that forty North Carolina counties are covered under § 5 and that they are so located as to require all statewide redistricting plans to be submitted for preclearance provided the legislature with a factual basis for strong measures to combat the effects of discrimination in the political process. The Attorney General's refusal to preclear the State's first reapportionment plan bolsters that conclusion. *See Bakke*, 438 U.S. at 305 (Powell, J.) (§ 5 objection "properly is viewed" as "an administrative finding of discrimination").

This Court's decision in *Gingles* provided an independent basis on which the legislature could conclude that it has in fact a compelling interest in eliminating the effects of racial discrimination in the State's political processes. In *Gingles*, this Court affirmed extensive findings by a three-judge district court that there has been a lengthy past history of official racial discrimination in North Carolina's political system and in the State's policies generally and that the present effects of that history have a significant effect on the ability of African-Americans to participate equally in the State's political life. *Gingles v. Edmisten*, 590 F. Supp. 345, 359-67 (E.D.N.C. 1984). The district court also found that "within all the challenged [state legislative] districts racially polarized voting exists in a persistent and severe degree." *Id.* at 367. *See* 478 U.S. at 80 (approving district court's findings).[51]

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[51] The Plaintiffs' statement that "[n]o court or agency has determined that racial discrimination has ever occurred in the creation of congressional districts in North Carolina," Pl.Br. at 19, is factually inaccurate and legally inapposite. It is legally unnecessary to show that each particular aspect of an electoral system has had a discriminatory purpose and effect where, as in North Carolina, there is a history of discrimination "affect[ing] the exercise of the right to vote in all elections," *Jeffers v. Clinton*, 730 F. Supp. 196, 204 (E.D. Ark. 1989), *aff'd*

(continued...)

The legislature thus had ample reason to believe that racially polarized voting in North Carolina elections perpetuates the effects of past official discrimination and implicates the State through its electoral system in the operation of private prejudice. *See Croson*, 488 U.S. at 492-93.

The state Defendants submit that the implications of § 5 coverage and the findings in *Gingles* provide more than sufficient reason for the legislature to conclude that it had a "firm basis" on which to conclude that there has been past discrimination in the State's political processes and that the present effects of that discrimination warrant race-conscious measures. *See Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in judgment). In addition, and most simply, the State clearly has a compelling interest in complying with the Voting Rights Act, an interest that is of course closely related to its interest in combatting discrimination. "[T]he State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." *Croson*, 488 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment). *Accord, id.* at 491-93, 509-10 (O'Connor, J.). It is evident on the face of the Plaintiffs' complaint that the Plan is justified by a compelling governmental interest.

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[51](...continued)
mem., 111 S. Ct. 662 (1991). In any event, the district court in *Gingles* explicitly made findings about racial discrimination affecting the State's congressional elections. *See* 590 F. Supp. at 359-60, 364-65. The Plaintiffs, it should be noted, invoke African-American electoral success in non-congressional elections in their attempt to deny the continued existence of the effects of racial discrimination in the State's politics. Pl.Br. at 43, 59. In contrast, no African-American member of Congress was elected in North Carolina in this century until the 1992 election.

C. The State's Redistricting Plan Is Narrowly Tailored to the State's Goal of Complying with the Voting Rights Act and Remedying the Effects of Racial Discrimination.

Governmental programs subject to heightened scrutiny must also be appropriately tailored to the accomplishment of the goal the legislature is attempting to pursue. The Court's decisions reveal two major concerns in its review of the fit between means and end under this test. The Court questions, first, whether the program's use of race is overly broad or unnecessarily rigid. *See Wygant*, 476 U.S. at 276. In *Croson*, for example, this Court examined the city program's use of a rigid 30% quota and concluded that the choice of the figure was unrelated "to any goal, except perhaps outright racial balancing." 488 U.S. at 507. The Court also noted that the rigidity of the program, which made "the color of applicant's skin the sole relevant consideration," was unjustified given the existence of "an individualized procedure" for considering bids and waivers. *Id.* at 508.[52] "Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination." *Id.*

The legislature's creation of majority-minority districts, in contrast, is related precisely and directly to its goals. Faced with the existence of racially polarized voting, and with the Attorney

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[52] The Court's opinion observed that the city did not consider "the use of race-neutral means to increase minority business participation in city contracting." 488 U.S. at 507. In the context of a reapportionment plan subject to preclearance under § 5 of the Voting Rights Act, there were no "race-neutral" measures the legislature realistically could consider.

General's refusal to preclear a reapportionment plan containing only one majority-minority district, the legislature crafted a plan with two such districts, the number, location and shape of which were dictated by the number and residences of African-American North Carolinians. As many commentators have observed, majority-minority redistricting is the only effective means of overcoming the effects of racially polarized voting. *See, e.g.*, B. Grofman, L. Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* 129-37 (1992); A. Thernstrom, *Whose Votes Count?* 238-39 (1987).[53] The creation of majority-minority districts, furthermore, is a self-limiting remedy. If the racially polarized voting the effects of which the legislature is addressing diminish or disappear, then the "injury" Plaintiffs allege (their inability to elect candidates of their choice because of race) necessarily will disappear as well.[54]

The requirement of narrow tailoring also serves to minimize the harm that affirmative action programs impose on non-minority third parties who are denied public goods on the basis of race. *Croson*, 488 U.S. at 510; *id.* at 515-16 (Stevens, J., concurring in part); *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 486 (1986) (Powell, J., concurring) (impact on third

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[53] Professor Thernstrom, who is a distinguished and vigorous critic of race-conscious redistricting in most circumstances, has observed that "[t]here is no doubt that where 'racial politics . . . dominates the electoral process' and public office is largely reserved for whites, the method of voting should be restructured to promote minority officeholding. Safe black or Hispanic single-member districts hold white racism in check, limiting its influence." Thernstrom at 238-39. Where such conditions exist, majority-minority redistricting is a precise response to the problem. *Cf. Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part) (strict scrutiny requires examination of "the precision with which [the affirmative action program] bore on whatever injury in fact was addressed").

[54] The reapportionment Plan under review in this case is, of course, limited in an even simpler fashion by the fact that it will be in effect only for a decade.

parties is a factor "of primary importance"). *See also Metro Broadcasting*, 110 S. Ct. at 3026 (under intermediate level scrutiny, Court will find the required "substantial relationship" to an important governmental interest only if the program "does not impose *undue* burdens on nonminorities"). Opinions applying the narrow-tailoring requirement consequently have looked to the severity of the harm done third parties, *Wygant*, 476 U.S. at 280-84 (Powell, J.); *id.* at 294-95 (White, J., concurring in the judgment); *id.* at 318-19 (Stevens, J., dissenting), and to the degree to which their "settled expectations" are infringed or denied. *Id.* at 283 (Powell, J.).

The State's reapportionment Plan is narrowly tailored so as to avoid unnecessary harm to nonminority voters. The Plan imposes no racial quota and places no obstacle in the way of Plaintiffs' full participation in the political process. *Bakke*, 438 U.S. at 305 (Powell, J.). The Plaintiffs remain completely free to express their political views, to support candidates of their choice, and to seek public office. The fact that as a consequence of the Plan two of the Plaintiffs find themselves in the racial minority in their congressional district is no more a cognizable injury than is the fact that non-white voters are in the minority in ten of the State's congressional districts. The Plaintiffs have suffered no constitutional injury, and their speculations about the future course of congressional elections or the possible inadequacy of their representation in the future provide no basis on which to conclude that their legitimate expectations have been overturned. *See* Thernstrom at 242 (white voters whose candidates "could win . . . in a differently constituted district" are not even arguably denied "a right" by majority-minority redistricting).

The Plaintiffs have offered no alternative means by which the General Assembly could have pursued effectively its compel-

ling interest in complying with the Voting Rights Act and combatting the effects of racial discrimination in the State's political processes. In light of the close fit between that goal and the State's creation of two majority-minority districts, it is clear on the face of the complaint that the Plaintiffs cannot carry the burden of demonstrating that the State's Plan is not adequately tailored to serve the State's compelling interests.

CONCLUSION

The Court should affirm the judgment entered in the cause by the three-judge United States District Court for the Eastern District of North Carolina.

Respectfully submitted,

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AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV.

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

§ 2. The congress shall have power to enforce this article by appropriate legislation.

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42 USC § 1973

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

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42 USC § 1973c

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with

such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

28 CFR Part 51

§ 51.51 Purpose of this subpart.

The purpose of this subpart is to inform submitting authorities and other interested parties of the factors that the Attorney General considers relevant and of the standards by which the Attorney General will be guided in making substantive determinations under Section 5 and in defending Section 5 declaratory judgment actions.

§ 51.52 Basic standard.

(a) *Surrogate for the court.* Section 5 provides for submission of a voting change to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under Section 5: Whether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. The burden of proof is on a submitting authority when it submits a change to the Attorney General for preclearance, as it would be if the proposed change were the subject of a declaratory judgment action in the U.S. District Court for the District of Columbia. See *South Carolina v. Katzenbach*, 383 U.S. 301, 328, 335 (1966).

(b) *No objection.* If the Attorney General determines that the submitted change does not have the prohibited purpose or effect, no objection shall be interposed to the change.

(c) *Objection.* An objection shall be interposed to a submitted change if the Attorney General is unable to determine that the change is free of discriminatory purpose and effect. This

includes those situations where the evidence as to the purpose or effect of the change is conflicting and the Attorney General is unable to determine that the change is free of discriminatory purpose and effect.

§ 51.54 Discriminatory effect.

(a) *Retrogression.* A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e., will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively. See *Beer v. United States*, 425 U.S. 130, 140-42 (1976).

§ 51.55 Consistency with constitutional and statutory requirements.

(a) *Consideration in general.* In making a determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b), Sections 2, 4(a), 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.

(b) *Section 2.* (1) Preclearance under Section 5 of a voting change will not preclude any legal action under Section 2 by the Attorney General if implementation of the change subsequently demonstrates that such action is appropriate. (2) In those instances

in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General shall withhold Section 5 preclearance.

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U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20035*

Tiare B. Smiley, Esq.
Special Deputy Attorney General DEC 18 1991
P.O. Box 629
Raleigh, North Carolina 27602-0629

Dear Ms. Smiley:

This refers to Chapter 675 (1991), which provides for the 1991 redistricting and a change in the method of election from 42 single-member districts and 30 multimember districts to 75 single-member districts and 20 multimember districts for the House of Representatives; Chapter 676 (1991), which provides for the 1991 redistricting plan and a change in the method of election from 22 single-member districts and 28 multimember districts to 34 single-member districts and 8 multimember districts for the Senate; and Chapter 601 and Chapter 761 (1991), which provide for the increase from eleven to twelve congressional districts and the 1991 redistricting plan for the congressional districts for the State of North Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your response to our request for more information on November 5, 1991; supplemental information was received on November 18, 20, 21, 25, 26 and 27, and December 4, 10, 12 and 13, 1991.

We have carefully considered the information you have provided, as well as Census data and information and comments

from other interested persons. At the outset, we note that 40 of North Carolina's 100 counties are covered under the special provisions of Section 5 of the Voting Rights Act. As it applies to the redistricting process, the Voting Rights Act requires the Attorney General to determine whether the submitting authority has sustained its burden of showing that each of the legislative choices made under a proposed plan is free of racially discriminatory purpose or retrogressive effect and that the submitted plan will not result in a clear violation of Section 2 of the Act. In the case of statewide redistricting such as the instant ones, this examination requires us not only to review the overall impact of the plan on minority voters, but also to understand the reasons for and the impact of each of the legislative choices that were made in arriving at a particular plan.

In making these judgments, we apply the legal rules and precedents established by the federal courts and our published administrative guidelines. See, e.g., 28 C.F.R. 51.52(a), 51.55, 51.56. For example, we cannot preclear those portions of a plan where the legislature has deferred to the interests of incumbents while refusing to accommodate the community of interest shared by insular minorities, see, e.g., Garza v. Los Angeles County, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991); Ketchum v. Byrne, 740 F.2d 1398, 1408-09 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985), or where the proposed plan, given the demographics and racial concentrations in the jurisdiction, does not fairly reflect minority voting strength. Thornburg v. Gingles, 478 U.S. 30 (1986); Hastert v. State Board of Elections, ___ F. Supp. ___ (N.D. Ill., Nov. 6, 1991), 1991 WL 228185; Wilkes County, Georgia v. United States, 450 F. Supp. 1171, 1176 (D.D.C. 1978), aff'd. mem., 439 U.S. 999 (1978).

Such concerns are frequently related to the unnecessary fragmentation of minority communities or the needless packing of minority constituents into a minimal number of districts in which they can expect to elect candidates of their choice. See 28 C.F.R. 51.59. We endeavor to evaluate these issues in the context of the demographic changes which compelled the particular jurisdiction's need to redistrict and the options available to the legislature. Finally, our entire review is guided by the principle that the Act ensures fair election opportunities and does not require that any jurisdiction guarantee minority voters racial or ethnic proportional results.

With this background in mind, our analysis shows that, in large part, the North Carolina House, Senate and Congressional redistricting plans meet the Section 5 preclearance requirements. Each plan, however, has particular problems which raise various concerns for us under the Voting Rights Act. We describe each of these problem areas separately below.

Respecting the House plan, the proposed configuration of district boundary lines in the following three areas of the state appear to minimize black voting strength: the Southeast area, involving Sampson, Pender, Bladen, Duplin, New Hanover, Wayne, Lenoir and Jones Counties; the Northeast area in which the state proposes to create District 8; and Guilford County.

In general, it appears that in each of these areas the state does not propose to give effect to overall black voting strength, even though it seems that boundary lines logically could be drawn to recognize black population concentrations in each area in a manner that would more effectively provide to black voters an equal opportunity to participate in the political process and to elect candidates of their choice. Another factor which appears to adversely impact on minority voting strength, by limiting the

number of majority minority districts, was the state's decision to manipulate black concentrations in a way calculated to protect white incumbents.

In the Southeast area of the state, the state was aware of the significant interest on the part of the black community in creating districts in which they would constitute a majority. In fact, alternatives providing for two additional black majority districts were presented to the legislature. Rather than using this approach to recognize black voting strength, however, the proposed plan submerges concentrations of black voters in several multimember, white majority districts. Our own analysis suggests that a number of different boundary line configurations may be possible which more fairly recognize black population concentrations and provide minority voters an opportunity to elect candidates of their choice in at least one additional district.

In the Northeastern portion of the state, District 8 seems to have been drawn in such a way as to limit unnecessarily the potential for black voters to elect representatives of their choice. In spite of the 58 percent black population majority, serious concerns have been raised as to whether black voters in this district will have an equal opportunity to elect their preferred candidate, particularly given the fact that only 52 percent of the registered voters in the district are black. Our analysis indicates that a number of different options are available to draw District 8 in a manner which provides blacks an equal opportunity to participate in the electoral process (e.g., including in District 8 black concentrations in adjoining districts).

Similarly, in Guilford County, the proposed plan fails to recognize black population concentrations, although reasonable configurations of boundary lines would permit an additional district that would provide black voters the opportunity to elect their

candidates of choice. While we have noted the state's assertion that the division of the black community in Guilford County into several districts enhances black voting strength by providing black voters an opportunity to influence elections in additional districts, it appears that the plan in fact was designed to ensure the re-election of white incumbents. This conclusion is bolstered by what appears to be similarly motivated decisions of the legislature involving other areas of the state, such as in Mecklenburg County. There, the state drew two minority House districts, while the minority population appears to be sufficiently concentrated to allow for the drawing of three districts in which black voters would have an opportunity to elect candidates of their choice. While we are aware that Mecklenburg is not a county subject to the preclearance requirements of Section 5, information regarding the choices of boundary line changes in the county is relevant to our review of the concern that purposeful choices were made throughout the redistricting processes that adversely impact minority voting strength.

Respecting the Senate redistricting plan, the state has proposed district boundary lines in the southeast region of the state that appear to minimize black voting strength, given the particular demography of this area. Although boundary lines logically could be drawn to recognize black population concentrations in a manner that would more effectively provide to black voters an equal opportunity to participate in the political process and to elect a candidate of their choice, the proposed districts seem to be the result of the state's decision to use concentrations of black voters in white majority districts to protect white incumbents. Black citizens from this area testified that they felt a black majority single-member district could be fairly drawn, and alternatives providing for a black majority district were presented to the legislature. It appears, however, that concentrations of black

voters have been submerged in several white majority districts. Our own analysis suggests that a number of different boundary line configurations may be possible which more fairly recognize black population concentrations and provide minority voters an opportunity to elect candidates of their choice in at least one additional district.

Respecting the congressional redistricting plan, we note that North Carolina has gained one additional congressional seat because of an increase in the state's population. The proposed congressional plan contains one majority black congressional district drawn in the northeast region of the state. The unusually convoluted shape of that district does not appear to have been necessary to create a majority black district and, indeed, at least one alternative configuration was available that would have been more compact. Nonetheless, we have concluded that the irregular configuration of that district did not have the purpose or effect of minimizing minority voting strength in that region.

As in the House and Senate plans, however, the proposed configuration of the district boundary lines in the south-central to southeastern part of the state appear to minimize minority voting strength given the significant minority population in this area of the state. In general, it appears that the state chose not to give effect to black and Native American voting strength in this area, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration in this part of the state. Jeffers v. Clinton, 730 F.Supp. 196, 207 (E.D. Ark. 1989), affirmed, 111 S. Ct. 662 (1991).

We also note that the state was well aware of the significant interest on the part of the minority community in creating a second majority-minority congressional district in North Carolina.

For the south-central to southeast area, there were several plans drawn providing for a second majority-minority congressional district, including at least one alternative presented to the legislature. No alternative plan providing for a second majority-minority congressional district was presented by the state to the public for comment. Nonetheless, significant support for such an alternative has been expressed by the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU). These alternatives, and other variations identified in our analysis, appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but, despite this fact, such configuration for a second majority-minority congressional district was dismissed for what appears to be pretextual reasons. Indeed, some commenters have alleged that the state's decision to place the concentrations of minority voters in the southern part of the state into white majority districts attempts to ensure the election of white incumbents while minimizing minority electoral strength. Such submergence will have the expected result of "minimiz[ing] or cancel[ling] out the voting strength of [black and Native American minority voters]." Fortson v. Dorsey, 379 U.S. 433, 439 (1965). Although invited to do so, the state has yet to provide convincing evidence to the contrary.

In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that the state's burden has been sustained in this instance with respect to the three proposed plans under review. Therefore, on behalf of the Attorney General, I must object to the 1991 redistricting for the North Carolina State House, Senate and Congressional plans to the extent that each incorporates the proposed configurations for the areas discussed above.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed 1991 House, Senate and Congressional redistricting plans have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race or color. In addition, you may request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the 1991 redistrictings for the North Carolina House, Senate and Congressional plans continue to be legally unenforceable. Clark v. Roemer, 59 U.S.L.W. 4583 (U.S. June 3, 1991); 28 C.F.R. 51.10 and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of North Carolina plans to take concerning these matters. If you have any questions, you should call Richard Jerome (202-514-8696), an attorney in the Voting Section.

Sincerely,

John R. Dunne
Assistant Attorney General
Civil Rights Division

ANALYSIS OF NORTH CAROLINA CONGRESSIONAL DISTRICTS BY TOTAL POPULATION

District Name	Number Members	Total Population	Ideal Population	District Variance	% District Variance
District 1	1	552,386	552,386	0	0.00%
District 2	1	552,386	552,386	0	0.00%
District 3	1	552,387	552,386	1	0.00%
District 4	1	552,387	552,386	1	0.00%
District 5	1	552,386	552,386	0	0.00%
District 6	1	552,386	552,386	0	0.00%
District 7	1	552,386	552,386	0	0.00%
District 8	1	552,387	552,386	1	0.00%
District 9	1	552,387	552,386	1	0.00%
District 10	1	552,386	552,386	0	0.00%
District 11	1	552,387	552,386	1	0.00%
District 12	1	552,386	552,386	0	0.00%
Total	12	6,628,637	6,628,632	0	0.00%

Source: 1990 Census of Population and Housing P.L. 94-171

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Analysis of North Carolina Congressional Districts for Total Population by Race

District Name	Total Pop.	Total White	Total Black	Total Am. Ind.	Total Asian/PI	Total Other
District 1	552,386	229,829	316,290	3,424	1,146	1,698
	100.00%	41.61%	57.26%	0.62%	0.21%	0.31%
District 2	552,386	421,083	121,212	3,154	4,077	2,860
	100.00%	76.23%	21.94%	0.57%	0.74%	0.52%
District 3	552,387	423,398	118,640	2,436	4,044	3,869
	100.00%	76.65%	21.48%	0.44%	0.73%	0.70%
District 4	552,387	426,361	111,168	1,548	10,602	2,714
	100.00%	77.19%	20.13%	0.28%	1.92%	0.49%
District 5	552,386	463,183	83,824	1,083	2,448	1,848
	100.00%	83.85%	15.17%	0.20%	0.44%	0.33%
District 6	552,386	504,465	41,329	1,973	3,489	1,129
	100.00%	91.32%	7.48%	0.36%	0.63%	0.20%

(continued)

District 7	552,386	394,855	103,428	40,166	5,835	8,102
	100.00%	71.48%	18.72%	7.27%	1.06%	1.47%
District 8	552,387	402,406	128,417	13,789	4,232	3,543
	100.00%	72.85%	23.25%	2.50%	0.77%	0.64%
District 9	552,387	492,424	49,308	1,729	7,373	1,553
	100.00%	89.14%	8.93%	0.31%	1.33%	0.28%
District 10	552,386	517,542	30,155	942	2,238	1,510
	100.00%	93.69%	5.46%	0.17%	0.41%	0.27%
District 11	552,387	502,058	39,767	7,835	1,791	936
	100.00%	90.89%	7.20%	1.42%	0.32%	0.17%
District 12	552,386	230,888	312,791	2,077	4,891	1,739
	100.00%	41.80%	56.63%	0.38%	0.89%	0.31%
Total	6,628,637	5,008,492	1,456,329	80,156	52,166	31,501
	100.00%	75.56%	21.97%	1.21%	0.79%	0.48%

Source: 1990 Census of Population and Housing P.L. 94-171

Analysis of North Carolina Congressional Districts for Voting Age Population by Race

District Name	Total Pop.	Total White	Total Black	Total Am. Ind.	Total Asian/PI	Total Other
District 1	399,969	181,933	213,602	2,428	844	1,110
	100.00%	45.49%	53.40%	0.61%	0.21%	0.28%
District 2	420,087	328,676	84,311	2,173	3,074	1,963
	100.00%	78.24%	20.07%	0.52%	0.73%	0.47%
District 3	413,263	324,808	81,170	1,755	2,922	2,608
	100.00%	78.60%	19.64%	0.42%	0.71%	0.63%
District 4	428,984	336,850	81,210	1,239	7,782	1,903
	100.00%	78.52%	18.93%	0.29%	1.81%	0.44%
District 5	428,782	364,886	60,204	822	1,650	1,221
	100.00%	85.10%	14.04%	0.19%	0.38%	0.28%
District 6	428,096	393,271	30,188	1,433	2,407	798
	100.00%	91.87%	7.05%	0.33%	0.56%	0.19%

(continued)

District 7	414,413	306,754	71,071	26,489	4,201	5,898
	100.00%	74.02%	17.15%	6.39%	1.01%	1.42%
District 8	403,678	305,366	84,386	8,699	2,956	2,271
	100.00%	75.65%	20.90%	2.15%	0.73%	0.56%
District 9	421,615	380,364	33,849	1,275	5,059	1,069
	100.00%	90.22%	8.03%	0.30%	1.20%	0.25%
District 10	421,456	397,476	20,837	700	1,409	1,036
	100.00%	94.31%	4.94%	0.17%	0.33%	0.25%
District 11	430,457	396,064	27,438	5,126	1,237	592
	100.00%	92.01%	6.37%	1.19%	0.29%	0.14%
District 12	411,687	186,115	219,610	1,529	3,283	1,150
	100.00%	45.21%	53.34%	0.37%	0.80%	0.28%
Total	5,022,487	3,902,563	1,007,876	53,668	36,824	21,619
	100.00%	77.70%	20.07%	1.07%	0.73%	0.43%

Source: 1990 Census of Population and Housing P.L. 94-171